

**IN THE HIGH COURT OF TANZANIA**

**TEMEKE SUB-REGISTRY**

**(ONE STOP JUDICIAL CENTRE)**

**AT TEMEKE**

**MISC. CIVIL APPLICATION NO.65 OF 2022**

*(Arising from Civil Appeal No. 34 of 2022 at the High Court of Tanzania*

*Temeke Sub-Registry (One Stop Judicial Centre) at Temeke)*

**MWAJUMA MOHAMED MGANGA ..... APPLICANT**

**VERSUS**

**MOHAMED SAID MOHAMED..... RESPONDENT**

**RULING**

Date of last order: 22/03/2023

Date of Judgment: 22/05/2023

**OMARI, J.**

This Application arises from Civil Appeal No. 34 of 2022 which is pending before this court. The Applicant filed the Application in a bid to beseech this court to grant a temporary order to prevent the Respondent from taking the monetary compensation derived from the acquisition and intended demolition of House No. KND/MZM/IDR14/21 which is in Kinondoni, Dar es Salaam from the World Bank Project pending the hearing of this Application and that of Civil Appeal No. 34 of 2022 which is pending in this court to be determined.

In her Affidavit in support of the Application the Applicant among others averred that she petitioned for divorce vide Matrimonial Cause No. 116 of 2021 at the Temeke District Court at the One Stop Judicial Centre and was aggrieved by the resultant decision therefore preferred Civil Appeal No. 34 which is currently pending in court. She is therefore seeking a temporary injunction that the payment of compensation for the house from a World Bank project should not be effected until the determination of the pending Appeal. If this is done otherwise, she is bound to lose her rights since the Respondent is intent on defrauding her right to her share of the said money.

On the date set for hearing of this Application, the Respondent's counsel informed this court that in addition to filing a Counter Affidavit, they have raised and filed a notice of a Preliminary Objection which they seek this court to determine. On the date set for hearing of the Preliminary Objection raised the Applicant had the services of Karilo Karilo and the Respondent had the services of Ibrahim Shineni and Mikidadi Hassan all of whom are learned advocates.

Arguing in support of the Preliminary Objection raised, the Respondent's counsel submitted that their objection is based on the fact that the Affidavit accompanying the Application is illegal for containing hearsay, arguments and

prayers. Referring to the Oaths and Statutory Declarations Act, 1967 and the Civil Procedure Code CAP 33 R.E 2019 (the CPC) Order XIX Rule 3 (1) which states how an Affidavit is supposed to be he contended that when an Affidavit is for an Application it should contain facts that are known to the deponent or facts that the deponent knows to be true as was explained in various cases including the famous *Ex- Parte Matovu* case (that is, **Uganda vs. Commissioner of Prisons, Ex-parte Matovu** (1966) EA 516). The counsel for the Respondent argued that section 62 (1) (a)-(d) of the Tanzania Evidence Act, CAP 6 R.E 2023 provides for the requirements of an Affidavit to be used as a substitute for oral evidence, which includes there being no hearsay or speculations. He contended that in the Affidavit accompanying the present Application; Paragraphs 8,9 and 10 are laden with hearsay and indirect evidence therefore lacking the requisite qualification of being a substitute to oral evidence. He continued to attack the said Affidavit by stating that Paragraph 7 is redundant as it does not convey any information while the following Paragraphs lack any documentation to support their contents. He concluded his submission by segueing back to the **Uganda v. Commissioner of Prisons, Ex-parte Matovu** (*supra*) case which gives directives to the effect that the offending Paragraphs be expunged, whereas in the present Application if Paragraphs 7 through to 10 of the Affidavit are expunged then

the Application is not supported by any Affidavit as it is no longer proper. He then prayed for the said Application to be struck out.

When it was the turn of the Applicant's advocate, he straight forwardly started by declaring that his learned brother's submission was not enough to convince this court to struck out the Application for lacking an accompanying Affidavit as the said argument lacks merit. He further argued that the Affidavit in question has correct averments of the Applicant according to her understanding and not hearsay as submitted by Mr. Shineni. Moreover, he argued that this court has the ability to exercise its discretion and powers by not considering technicalities as laid down by sections 3A and 3B of the CPC. He continued to argue that the identified Paragraphs contain full information and facts well known to the Applicant and therefore not hearsay. Mr. Shineni's submission, according to him is based on evidence which is not supposed to be a Preliminary Objection as a Preliminary Objection should be on a pure point of law as established in the case of **Mukisa Biscuits Manufacturing Co. v. West End Distributors Limited** [1969] EA 696. He then proceeded to point out that the identified Paragraphs in the said Affidavit were not containing hearsay as argued by the Respondent's counsel. In conclusion he prayed for this court to be guided by Article 107 A (1) of the Constitution of the United

Republic of Tanzania, 1977 (the CURT) and dispense justice without technicalities and overrule the objection.

In rejoinder, the Respondent's advocate once more attacked the Affidavit for containing hearsay. He contended that the reference to **Mukisa Biscuits Manufacturing Co. v. West End Distributors Limited** (*supra*) by Mr. Karilo is irrelevant since his submission is in fact based on Order XIX Rule 3(1), Order XLIII Rule 3 of the CPC and section 42 also of the CPC all of which govern Affidavits therefore the objection is and based on a point of law and not evidence. He concluded by stating that the Article of the CURT referred to by Mr. Karilo does not do away with legal requirements, therefore vehemently argued that the Chamber Summons is not supported by an Affidavit making it improper.

Having considered the submissions of both learned counsels there is only one issue for determination, that is, whether the Preliminary Objection raised by the Respondent is meritorious. However, before doing that I would like to weigh in on Mr. Karilo's suggestion that this court should facilitate the dispensation of justice without being encumbered with technicalities while making reference to Article 107A (1) of the CURT and sections 3A and 3B of the CPC respectively. These provisions, are often collectively used when

counsel seek to invoke the oxygen principles which are also known as overriding objectives.

In this particular Application, it is my considered opinion that invoking those provisions is a misuse of the principles and more so the spirit on which they are founded upon. There is nothing in the said provisions that seems to suggest that the court should trivialize mandatory rules as laid down by the law. What exactly the overriding objective principles entail are as provided for in section 3B of the CPC and in my very humble opinion there is nothing therein that warrants trivializing rules of procedure, or giving them a skewed interpretation to cover up for litigants' omissions. The principle is in my very humble opinion was not supposed to facilitate disregard for procedures then invoke it to make problems disappear or change form. Courts have already addressed this issue, that the principles were not meant for curing legal defects that would otherwise topple a matter before a court see for example **Juma Busiya v. Zonal Manager, South Tanzania Postal Corporation** (Civil Appeal No.273 of 2020) [2021] TZCA 522; **Jacob Bushiri v. Mwanza City Council & Others** (Civil Appeal No.36 of 2019) [2021] TZCA 300. As for the reliance and mention of the CURT which is somewhat currently considered "woke" in litigating various matters I seek to be persuaded and guided by the wisdom of this court

in **Shabani Mwangesi v. National Corporation**, High Court, Civil Appeal No. 44 of 1994, (unreported) where it was held: -

*'It is a cardinal principle of constitution law that where an issue can be resolved without recourse to the constitution, the Constitution should not be involved...'*

So, while it is true that this court can and should exercise its discretion and powers being guided by sections 3A and 3B of the CPC as well as being guided by the CURT when dispensing justice, it is still obligated to do so within the confines of the law of the land.

It is trite law that an Application of this nature must be supported by an Affidavit as us provided for under Order XLIII Rule 2 as well as Order XIX of the CPC respectively. Order XIX Rule 3 (1) of the CPC provides that:

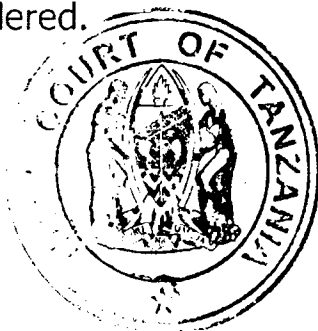
*'Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory Applications on which statements of his beliefs may be admitted. Provided: the grounds thereof are stated.'*


In the current Application; I agree with the Respondent's learned counsel that Paragraph 7 is rather incomplete and does not communicate anything, thus redundant. It is true that when the learned advocate for the Applicant was submitting in defense of the same, he had to read into the said Paragraph to explain what information was actually being conveyed by the same. The rest of the Paragraphs that have been identified by the Respondent's counsel, that

is 9, 10 and 11 contain hearsay and or prayers. This leaves Paragraphs 1 through to 6 and Paragraph 8. In the whole in the absence of the identified Paragraphs the Affidavit cannot be said to have any meaning in terms of establishing facts that may call for this court's intervention. This is well spelled out in the case of **Joseph Peter Daudi and another v. Attorney General and 3 others**, Misc. Land Application No. 447 of 2020 where this court invoked the Court of Appeal's reasoning in **Tanzania Breweries Limited v. Herman Bildad Minja**, Civil Application No. 11/18 of 2019 (unreported).


I therefore find the Affidavit of the Applicant fatally defective as a result making the Application incompetent. Therefore, the Preliminary Objection raised has merit and it is sustained. Consequently, the Application is struck out. Each party will bear their own costs.

It is so Ordered.



  
A.A. OMARI  
JUDGE  
22/05/2023

Judgment delivered and dated 22<sup>nd</sup> day of May, 2023.

  
A.A. OMARI  
JUDGE  
22/05/2023